

6 Official Opinions of the Compliance Board 104 (2009)

Exceptions Permitting Closed Sessions – Personnel – City Council’s review of city manager’s performance held within exception

Exceptions Permitting Closed Sessions – Legal And Personnel – While much of discussion came within exceptions, to extent discussion concerned decision to further explore outsourcing of municipal golf course, violated Act.

May 1, 2009

Joseph Jordan

The Open Meetings Compliance Board has considered your complaint that the Mayor and City Council of Rockville violated the Open Meetings Act by considering, during meetings closed pursuant to the Act, matters beyond those permissible under the statutory exceptions cited to close the meetings. For the reasons explained below, we find that no violation occurred at a closed session held January 12, 2009. As to the closed meeting on January 26, 2009, the portion of the discussion that extended beyond personnel matters and the impact on specific employees or legal advice about the lease extended beyond the permissible bounds for a closed meeting under the Act.

I

Complaint and Response

According to the complaint, an agenda for a meeting of the governing body of Rockville held on January 12, 2009, indicated that a closed session was to occur “to conduct the annual performance review of the City manager.” However, the complaint indicated that, during the closed session, the idea of the Montgomery County Revenue Authority assuming the management of the City-owned RedGate Golf Course was pursued, a vote occurred, and staff was instructed to pursue the opportunity. In the words of the complaint, “it would appear this business started behind closed doors while supposedly doing a performance review, and concluded behind closed doors while supposedly getting legal advice on leasing city property” Based on a newspaper account, the complaint indicated that the City Manager viewed this as a personnel matter, and the meeting was conducted in a manner so as to protect employees from receiving certain news prematurely. However, the complaint argued that there is not a valid link between matters that might legitimately be

addressed in closed session and the alternatives under consideration with respect to the golf course.

The complaint also alleged a violation of the Open Meetings Act in connection with a closed session held on January 26, 2009. The complaint indicated that an agenda for the meeting indicated that the meeting would be closed “to discuss a personnel matter that affects one or more specific individuals regarding position reassignment and/or elimination; and ... to consult with counsel to obtain legal advice regarding the lease of a City facility.” The complainant argued that, once the legal advice was given, the closed session should have ended. Instead, according to the complaint, the governing body “went too far when they entered into discussions, and [conducted] a possible vote, to take action on consummating a deal” with the Montgomery County Revenue Authority to take over management of the golf course.

In a timely response on behalf of the City’s governing body, Debra Yerg Daniel, City Attorney for Rockville, discussed the history of the RedGate Golf course and the City’s need to consider options if the City is to avoid continuing its subsidy of the golf course’s operation out of the City’s general fund.¹ One option explored, initially at the staff level, was to out source operation of the golf course to the Montgomery County Revenue Authority.

Turning to the specific allegations in the complaint, the response noted that the closed meeting held on January 12, 2009, was limited to a performance review of the City Manager. Accompanying the response was a copy of the sealed minutes of the meeting. The response indicated that the confusion resulted from an erroneous e-mail sent by a member of the Council who misstated the date of the meeting involving the golf course. The response included a subsequent e-mail to you in which the Council member acknowledged that the reference should have referred to January 26.

According to the response, the January 26 closed session was closed by unanimous vote under §10-508(a)(1)(i) and (7). The closed session started with Scott Ullery, City Manager, stating that the focus of the meeting was a personnel matter affecting nine City employees. Burt Hall, Director of Recreation and Parks, then summarized the deteriorating financial condition of the golf course, the option of leasing the course to the Montgomery County Revenue Authority, and the impact the lease arrangement would have on

¹ The Compliance Board granted Ms. Daniel a brief extension of time to submit a response.

affected City employees. Carlos Vargas, Director of Human Resources, addressed job placement assistance and a proposed severance package that could be provided the nine employees should the City eventually approve leasing the golf course to the Montgomery County Revenue Authority. Paul Glasgow, then-municipal attorney, advised the governing body on the potential for negotiating lease terms that might provide employment opportunities to individuals who would be laid off by the City.

By majority vote, the governing body authorized staff to proceed with negotiations with the Montgomery County Revenue Authority and to notify affected City employees that this option was being explored. The governing body also authorized a severance package in the event a lease with the Montgomery County Revenue Authority was ultimately approved. According to an affidavit of the City Manager included with the response, “[t]he financial issues pertaining to [the golf course] and the option of leasing the golf course to the Revenue Authority was discussed for the purpose of providing the background for the personnel issues that were the focus of the executive session.” The response noted that no decision was made during the session to lease the golf course. The only decisions made by the City’s governing body were: (1) there was sufficient interest in the option of leasing the golf course to the Montgomery County Revenue Authority to have staff pursue it further, (2) a severance package was approved in the event a lease was entered; and (3) employees potentially impacted by any decision were to be notified before the decision to further explore the option of leasing the golf course was made public.

The response argued that the purpose of the closed session was to inform the City governing body of the impact on specific City employees that would result from a potential solution to the golf course’s financial problems: “The Mayor and Council determined that both propriety and privacy concerns required that the City inform the affected employees if [the Revenue Authority] option was under consideration and that the resulting potential loss of jobs and tentative layoff plan, before making that information public.” The response claimed that it was not possible to discuss the personnel issues potentially affecting the nine City employees without any discussion of the golf course’s financial situation and the Revenue Authority option since the personnel issues would only arise if the option was pursued. “All that was ‘decided’ ... was that the lease option should be explored further through negotiations with the Revenue Authority” and that employees be informed. No decision on leasing the golf course was made during the closed session. The response went on to address events subsequent to the closed session. In summary, the response stated that the governing body believes it acted

“appropriately and responsibly” in conducting the January 26 closed session under §10-508(a)(1).²

II

Analysis

January 12, 2009 Session

The closed session held on January 12, 2009, involved a single purpose - a review of the City Manager’s performance. The sealed minutes of the meeting confirmed the subject of discussion.³ The future of the City golf course was not addressed. Thus, we find that the City governing body acted properly when it conducted this session and that no violation of the Open Meetings Act occurred.

January 26, 2009 Session

In analyzing the permissible scope of discussions during the course of a meeting closed under any of the exceptions listed in §10-508(a), we must keep in mind the General Assembly’s directive that each of the exceptions must be strictly construed in favor of open meetings. §10-508(c).

In a prior opinion, the Compliance Board addressed the propriety of a municipal governing body closing a meeting under the §10-508(a)(1) to discuss the impact on employees should responsibility for certain services be transferred from one governmental entity to another. 1 *OMCB Opinions* 53 (1993). Although the facts differed from the situation here, we recognized that a discussion of the fate of specific employees would constitute a personnel matter. *Id.* at 55. However, we also cautioned that the Act does not permit

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

The response included additional attachments, including affidavits from the Director of Recreation and Parks and the Director of Human Relations. Minutes for the closed session held January 26, 2009, were not yet available at the time the response was submitted. It was also noted that the Revenue Authority option was no longer being pursued.

³ While the City provided us with a copy of the minutes of the closed session, the minutes of the closed session remain confidential under the Act. §§10-502.5(c)(2)(iii).

closed discussion of decisions with respect to a broad category or a class of personnel, where there is no discussion of the particular individuals who hold positions within the class. *Id.* For example, in a later opinion, we rejected the suggestion that a municipal governing body could close a meeting as a personnel matter in order to consider whether to provide a certain fringe benefit to municipal employees. 1 *OMCB Opinions* 73, 75 (1994). We stated that, “[i]f ... the issue is one affecting an entire class of employees, the exception in §10-508(a)(1) may not be invoked.” *Id.*

We subsequently evaluated a meeting closed by a municipal governing body under §10-508(a)(1) to discuss the possibility of establishing a joint purchasing office with another governmental entity. 1 *OMCB Opinions* 255 (1997). The municipality argued that, “in looking at combining offices ... one must consider a reduction in work force and this clearly affects individual employees.” *Id.* Three employees and two department heads were potentially affected by the decision. *Id.* at 259. We agreed that a discussion about consolidation would logically involve the status of various employees’ continued employment, *e.g.*, possible dismissal, lay-offs, reassignment, or the like. We concluded that, to the extent that the discussion of merging the purchasing offices was linked to decisions about identifiable individuals, it was within the confines of the personnel exception. *Id.* However, we also noted that it was difficult to imagine that the entire discussion was so confined. *Id.*

Turning to the meeting at hand, we appreciate the governing body’s concern about how affected employees would learn of their fate, based on what course of action the City might chose to explore as to the future operation of the golf course. But clearly any consideration about discontinuing a particular service or outsourcing responsibility for a service, or any discussion to explore such options, cannot automatically be considered as involving a personnel matter, even through either action would likely impact employees’ jobs.

Here, it appears that much of the closed meeting discussion did qualify as personnel matters, *e.g.*, proposed severance benefits for those individuals affected and possible options to preserve their jobs should the Montgomery County Revenue Authority takeover operation of the golf course. While it might be suggested that discussions involved a class of employees, *i.e.*, all employees who worked at the golf course, the focus here seems to have been on the impact on individual employees, apparently a subgroup of the City’s Department of Recreation and Parks, who would be directly affected by the decision.

However, in directing staff to pursue this option, it is difficult to believe that other factors were not considered that impacted the governing body's action such as the cost to the City of the golf course operation. In fact, the response acknowledged such information was provided as background to the personnel issues that the lease of the golf course would raise. The decision for staff to further explore this option with the Montgomery County Revenue Authority cannot be said to constitute a personnel matter; clearly, factors in addition to the impact on City employees were involved. To the extent discussion during the closed session went beyond personnel matters pertaining to the individual employees who would be impacted, or legal advice from the municipal attorney in connection with the lease, the discussion extended beyond that permissible under provisions of the Act. We recognize that public disclosure that the City would explore this option may have made it impossible to notify employees before the matter was made public. However, this a result of the balancing of interests that is dictated by the Act.

III

Conclusion

In summary, we find that the Mayor and City Council of Rockville did not violate the Open Meetings Act when it conducted a closed session on January 12, 2009. As to closed meeting January 26, 2009, it appears that much of the discussion involved matters properly considered under the personnel exception as authorized under the Act. Similarly, the governing body was entitled to hear from its legal counsel in a closed session on options in structuring a lease agreement. However, the portion of the session during which the governing body considered other information and instructed staff to further explore the option of a lease arrangement with the Montgomery County Revenue Authority extended beyond the permissible bounds for a closed meeting under the Act.

OPEN MEETINGS COMPLIANCE BOARD

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